

1614279 (Migration) [2016] AATA 4711 (30 November 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Chao Li
CASE NUMBER:	1614279
DIBP REFERENCE(S):	BCC2015/3151984
MEMBER:	Catherine Carney-Orsborn
DATE:	30 November 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Statement made on 30 November 2016 at 11:52am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant did not comply with section 103 of the Migration Act and was not satisfied that the reasons for not cancelling the visa outweighed the decision to cancel it. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 22 November 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware of and any relevant changes in circumstances.
7. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
8. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

WAS THERE NON-COMPLIANCE AS DESCRIBED IN THE S.107 NOTICE?

9. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.103 in the following respects: On 21 December 2012 the applicant submitted an IELTS Test Report Form. On 21 August 2015 the applicant was interviewed by the Department. The applicant provided information that he sat for the IELTS test after 10 months of study and training for the IELTS test, he confirmed the photo of himself in the IELTS test which was lodged with the department, he confirmed his Chinese passport and confirmed his driver's licence.

10. The department completed a Facial Image Comparison report of the photos above and concluded that the photo in the IELTS photo was a different person. The applicant was informed that the delegate considered the he had not complied with s.103 as he supplied a bogus document. The letter then went into detail in relation to how the applicant could respond to the process and consequences of a visa cancellation.
11. The Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.
12. At the hearing and in submissions provided to the Department the applicant agreed that the IELTS test was a bogus document.
13. For these reasons, the Tribunal finds that there was non-compliance with s.103 by the applicant in the way described in the s.107 notice.
14. **Consideration of discretion**
15. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
16. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- **THE CORRECT INFORMATION**

- **THE CONTENT OF THE GENUINE DOCUMENT (IF ANY)**
- **WHETHER THE DECISION TO GRANT A VISA OR IMMIGRATION CLEAR THE VISA HOLDER WAS BASED, WHOLLY OR PARTLY, ON INCORRECT INFORMATION OR A BOGUS DOCUMENT**
- **THE CIRCUMSTANCES IN WHICH THE NON-COMPLIANCE OCCURRED**
- **THE PRESENT CIRCUMSTANCES OF THE VISA HOLDER**
- **THE SUBSEQUENT BEHAVIOUR OF THE VISA HOLDER CONCERNING HIS OR HER OBLIGATIONS UNDER SUBDIVISION C OF DIVISION 3 OF PART 2 OF THE ACT**
- **ANY OTHER INSTANCES OF NON-COMPLIANCE BY THE VISA HOLDER KNOWN TO THE MINISTER**
- **THE TIME THAT HAS ELAPSED SINCE THE NON-COMPLIANCE**
- **ANY BREACHES OF THE LAW SINCE THE NON-COMPLIANCE AND THE SERIOUSNESS OF THOSE BREACHES**
- **ANY CONTRIBUTION MADE BY THE HOLDER TO THE COMMUNITY.**

17. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers'. This policy requires delegates to also have regard to matters such as whether the visa would have been granted if the correct information had been given, whether there are persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, and whether the visa cancellation may result in Australia breaching its international obligations.
18. The applicant gave evidence on the above issues at hearing. The Tribunal went through the prescribed circumstances as set out in r.2.41. A summary of the evidence given is as follows.
19. The applicant claimed that the IELTS test was forged by the migration agent. He stated that he was previously not aware that he needed English and thought he only needed to provide evidence of his skills.
20. He claimed that he found out what the migration agent had done when he spoke with the migration Department in Darwin. He claims that the officer told him he had to meet the IELTS test otherwise he would be sent back to China.
21. He claims that in 2013 he paid a large sum of money to his migration agent. He claims he had to work to re-pay the debt and the agent told him he had to lie. The Tribunal indicated that there are authorities that he can complain to about the agent's behaviour. The Tribunal further pointed out that in his earlier response to the Department he did not mention his claims about the agent. The Tribunal asked if he had complained to the Department or others. He stated that he had told the Department.

22. He stated it was the agent's role to submit the documents he needed. He said words to the effect that he still owed the agent money. He stated that the agent was based in Shanghai and would give him a hard time if he returned.
23. The Tribunal asked him to if he wanted to put to the Tribunal any contributions he may have made to the Australian community. He said he paid tax, consumed in Australia and was a law abiding person. He said he has asked for enrolment in an English course in Darwin University. He said he is a capable employee.
24. He said words to the effect that he had a big argument with his migration agent as his agent has made him illegal in Australia. He again stated that he was initially not aware he needs English skills.
25. The Tribunal then read out to the applicant, for his comment, the details of an interview he had with the Department which is set out in the decision record. At that interview on 21 August 2015 he provided information that he sat for an IELTS test after 10 months of study and training for IELTS test, he confirmed a photo of himself in the IELTS test lodged with the department and further confirm that his Chinese passport and driver licence was his.
26. He responded that he was following the instructions of his agent.
27. The applicant provided a copy of his CV, his training certificates, academic record, evidence he has paid tax and a police certificate.
28. The Tribunal has considered all the evidence.

29. *The correct information*

30. The correct information is that the applicant did not sit the IELTS test. He has given evidence that he does not have sufficient English skills.

31. *The content of the genuine document (if any)*

32. This is not relevant as no genuine document was available in relation to his IELTS test.

33. *The likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document*

34. The applicant would not have been granted the visa if he did not provide evidence of his English proficiency. The applicant was granted the visa on the basis of the bogus IELTS test. The Tribunal gives this significant weight as it is clear the bogus document was provided with the intent to mislead the Department of Immigration and Border Protection.

35. *The circumstances in which the non-compliance occurred*

36. The non-compliance occurred when the applicant was providing information and documents for the grant of a Temporary Work (Skilled) subclass 457 visa.
37. The applicant in interview with the Department in August 2015 had confirmed the bogus document as genuine. He had indicated he had studied for 10 months before taking the test and confirmed that the photo was of him. In his response to the s.107 letter he stated that he apologized for his mistake. He wanted to work in Australia. He stated that his English was not as good as expected by the Australian government.

38. At hearing the applicant asserted that it was his migration agent who organised the bogus document. He stated that he did not know about the English requirement. The Tribunal does not accept that he did not know about the English requirement. The Tribunal after considering his evidence is of the view that he has sought to blame his agent at the hearing in his belief that this will allow him to remain in Australia.
39. He has not lodged any complaint against the agent and there is nothing before the tribunal other than his own assertion at hearing that he did not know of the English requirements. This is in contrast to his earlier interview and correspondence he sent to the Department in which he acknowledged his mistake. There is no evidence other than his assertion at hearing when queried that he notified the Department of his agent's activities in facilitating a bogus IETLS test.
40. After considering all the evidence the Tribunal is satisfied that the applicant was aware of the information provided to his agent and assisted with the provision of that information.

41. The present circumstances of the visa holder

42. The present circumstances of the applicant are that he is working in Australia and paying tax. He has provided certificates which indicate he has pursued obtaining further skills. He does not have any dependents in Australia. He was concerned about lower pay in China if he returned. He stated that he had skills which were in demand in Australia.
43. There is nothing to indicate that the applicant will not be able to find employment in China. If he returns to China he will have improved English language skills and employment experience in Australia. The Tribunal does not consider that he is settled in Australia as he was on a temporary visa. The Tribunal gives the applicants circumstance in Australia little weight.

44. The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

45. His subsequent behaviour is that he has admitted his non-compliance and in response to the Department's s.107 letter apologised in written correspondence from his email address.
46. At hearing he sought to deflect the blame for this conduct by asserting that his agent had indulged in behaviour which he was not aware of. He claimed that he did not know he needed English skills and his agent arranged everything. He claimed that he has argued with his agent. The Tribunal does not accept this, as the evidence recorded in his correspondence with the Department indicates that he was aware of the need for English. He participated in an interview and confirmed the bogus document as his. It was only at the hearing that he claimed that the agent had acted without his knowledge.
47. The Tribunal is satisfied that the applicant provided a bogus document and did not make efforts to give the correct information prior to the s.107 letter.

48. Any other instances of non-compliance by the visa holder known to the Minister

49. There is nothing before the Tribunal to indicate any other non-compliance.

50. The time that has elapsed since the non-compliance

51. It has been over four years since the compliance. The applicant has continued to work. He remains on a temporary visa. The 457 was always a temporary visa. The applicant does not have any other ties to Australia other than working on a temporary visa.

52. *Any breaches of the law since the non-compliance and the seriousness of those breaches*

53. There is no evidence of any breaches of the law. The applicant supplied a police certificate stating there are no disclosable court outcomes against his named.

54. *Any contribution made by the holder to the community*

55. The Tribunal asked the applicant if he wanted to provide evidence on any contribution to the Australian community. He stated that he worked paid taxes and was law abiding. The Tribunal considers that the applicant has also had an advantage from employment in Australia. He was paid a wage and would have developed his English and further skills in being employed. The Tribunal does not consider his working to be a significant contribution and gives it little weight.
56. The Tribunal has also considered other relevant factors that are set out in the Department's guidelines.
57. The Tribunal is satisfied that the visa could not have been granted to the applicant if there was no bogus document.
58. The Tribunal has considered whether there are persons in Australia whose visas would, or may, be cancelled under s.140. There are no other persons in Australia whose visas would or may, be cancelled as a result to the cancellation of the applicant's visa.
59. There is nothing before the Tribunal to indicate that there are any children in Australia whose interests would be affected by the cancellation.
60. The applicant claimed that if he returned to China the agent who lent him money would give him a hard time. The Tribunal has no other information before it than the applicant's own assertion at hearing that the agent would give him a hard time over his debt. He did not provide any further detail. The applicant had not previously brought up this issue before the Department. The Tribunal is not satisfied on the evidence before it that the applicant would face any serious harm if he were to return to China that would engage Australia's non-refoulement obligations.
61. There are mandatory legal consequences to a cancellation decision. A decision to cancel would have consequences on the applicant's future visas that he may apply for. It could also result in him having to return to China. The Tribunal has considered the consequences for the applicant and weighed it up against the evidence as outlined above.
62. The Tribunal has found that the applicant misled the Department by providing a bogus document. He did not provide any satisfactory explanation and at hearing sought to deflect blame on his agent.
63. The Tribunal gives the behaviour and misleading conduct outlined above indulged in by the applicant significant weight as it indicates an intentional willingness to circumvent the requirements of the Australian Migration Act and Regulations. The Tribunal is not satisfied that there are any factors that ameliorate this behaviour.
64. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

65. The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Catherine Carney-Orsborn
Member

ATTACHMENT – Relevant Extracts from the *Migration Act 1958*:

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]** or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and

^{*}This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

¹

- (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.